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No. 99-1193

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

RAYMOND L. FRAZER, *Petitioner*,

v.

STATE OF CALIFORNIA, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the California Supreme Court properly interpret *Collins v. Youngblood*, 497 U.S. 37 (1990) to find the California Legislature's revival of a time-barred criminal case, by a retroactive law enacted after the expiration of the previously-applicable statute of limitations, does not violate the Ex Post Facto Clause?

2. Did the California Supreme Court properly find the California Legislature's revival of a time-barred criminal case, by a retroactive law enacted after the expiration of the statute of limitations, did not violate the Due Process Clause?

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OPINION BELOW

The California Supreme Court's opinion is reported at *People v. Frazer*, 21 Cal. 4th 737, 88 Cal. Rptr. 2d 312, 982 P.2d 180 (1999). The Court's order modifying the opinion is reported at 21 Cal. 4th 867A.

JURISDICTION

The opinion of the California Supreme Court as to which petitioner seeks review was filed on October 20, 1999. The petition for writ of certiorari was timely filed. (Sup.Ct.Rule 13.3.)

This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONS AND STATUTES

United States Constitution, Article I, Section 10, Clause 1:

> "No state shall . . . pass any . . . ex post facto Law . . . ."

United States Constitution, Amendment XIV, Section 1:

> ". . . No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

California Penal Code sections 800 and 803(g). *See People v. Frazer*, 21 Cal. 4th at 743 n.2, 745 n.4, 746 n.9, 747 n.10.

STATEMENT OF THE CASE

In October 1996, petitioner was charged with one count of lewd or lascivious conduct with a child under the age of 14 years in violation of California Penal Code section 288(a), alleged to have been committed in 1984. In 1984, the statute of limitations for the charged offense was six years. Accordingly, prosecution was commenced pursuant to California Penal Code section 803(g), which provides that a complaint alleging the commission of a specified sex offense against a child may be filed within one year of the time the victim reports the crime to a law enforcement agency, provided the act involved substantial sexual conduct and there is independent evidence that clearly and convincingly corroborates the victim's allegation. *People v. Frazer*, 21 Cal. 4th at 742, 750-51.

Petitioner demurred, arguing that retroactive application of section 803(g), which took effect in 1994, violated ex post facto principles and denied him due process of law. The trial court sustained the demurrer,

and the state court of appeal affirmed. *People v. Frazer*, 21 Cal. 4th at 742, 750-51.

The California Supreme Court reversed the judgment of the court of appeal. A majority of the court found retroactive application of Penal Code section 803(g) did not violate ex post facto principles or deny a defendant due process of law. The dissent found a violation of the *state* constitutional due process clause. *People v. Frazer*, 21 Cal. 4th 737. The court denied petitioner's petition for rehearing. (Pet. Exs. B, C.)

REASONS FOR DENYING THE WRIT

ARGUMENT

I.

THE CALIFORNIA SUPREME COURT PROPERLY INTERPRETED *COLLINS V. YOUNGBLOOD*, 497 U.S. 37 (1990) TO FIND PETITIONER'S PROSECUTION DID NOT VIOLATE EX POST FACTO PRINCIPLES

Petitioner argued below that retroactive application of an extended statute of limitations, so as to revive an expired cause of action in a criminal case, violates the federal Ex Post Facto Clause. The California Supreme Court disagreed, finding petitioner's claim meritless under the formula prescribed in *Collins v. Youngblood*, 497 U.S. 37 (1990) for determining when penal legislation triggers ex post facto protection. *People v. Frazer*, 21 Cal. 4th at 754-65.

Petitioner asserts certiorari is necessary to resolve "ambiguous and possibly contradictory language from this Court's opinions" as to the scope of the Ex Post Facto Clause and to resolve "conflicts among the state courts of last resort" as to the constitutionality of retroactive revival of time-barred criminal actions. (Pet. at 5, 13.) Respondent disagrees.

A. *Collins v. Youngblood* Is A Clear And Unambiguous Statement Of The Law

In *Youngblood*, the California Supreme Court noted, this Court "subjected its ex post facto jurisprudence to close scrutiny" *Frazer*, 21 Cal. 4th at 756, and it "greatly

simplified ex post facto law," *Tapia v. Superior Court*, 53 Cal. 3d 282, 293 (1991). *Youngblood*, the state court found, held the Ex Post Facto Clause prohibits only two types of retroactive laws: those that "alter the definition of crimes or increase the punishment for criminal acts." *Frazer*, 21 Cal. 4th at 22, *quoting Youngblood*, 497 U.S. at 43; *see also Youngblood*, 497 U.S. at 44, 49; *California Department of Corrections v. Morales*, 514 U.S. 499, 504 (1995). A retroactive change in the statute of limitations, the state court held, does neither of these things, and so it is not proscribed, even though it may inure to a criminal defendant's disadvantage. *Frazer*, 21 Cal. 4th at 757-65.

According to petitioner, the instant case raises the issue of whether this Court in *Youngblood* intended "a literalistic 'definition of the crime' approach" and whether it "correctly states the *ex post facto* prohibition." (Pet. at 6.) "[O]ther passages of opinions of this Court," he says, "point away from a literalistic 'definition of the crime' approach." (Pet. at 6.) As support for this statement, petitioner relies on a pre-*Youngblood* case, *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), which was examined in detail in *Collins*, and on a one-line parenthetical summary in another case, *Hughes Aircraft Corp. v. United States ex re. Schumer*, 520 U.S. 939, 948 (1997), *citing* "[*Youngblood*] ('A law that abolishes an affirmative defense' violates the Ex Post Facto Clause)." (Pet. at 6-7.) An examination of *Youngblood*, however, makes clear this Court's intention that the Ex Post Facto Clause prohibits only those retroactive laws that "alter the definition of crimes or increase the punishment for criminal acts." *Youngblood*, 497 U.S. at 43.

In *Youngblood*, the Court addressed a sex offender's claim that a new statute permitting an appellate court to reform an otherwise improper verdict, rather than requiring a new trial, could not be applied retroactively. The Court of Appeals had held he was entitled to relief, relying on *Thompson v. Utah*, 170 U.S. 343 (1898) in which

this Court had held that procedural statutes cannot be retroactively applied unless they "'leave untouched all the substantial protections with which existing law surrounds the person accused of crime.'" *Id.* at 352, *quoted in Youngblood*, 497 U.S. at 40.

This Court reversed. In so doing, the Court endorsed its earlier formulation of the law in *Calder v. Bull*, 3 U.S. 386, and *Beazell v. Ohio*, 269 U.S. 167 (1925), as "faithful to our best knowledge of the original understanding" of the Ex Post Facto Clause. *Youngblood*, 497 U.S. at 43. It declared,

> It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with a crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto.

Id. at 42, *quoting Beazell*, 269 U.S. at 169-70.

In adhering rigidly to the *Beazell* and *Calder* definitions of the Ex Post Facto Clause as applying only to the three categories of proscribed laws, the Court rejected language in two of its previous cases that contained language indicating a more expansive interpretation. *Youngblood*, 497 U.S. at 46, *citing Duncan v. Missouri*, 152 U.S. 377, 382-83 (1894), and *Malloy v. South Carolina*, 237 U.S. 180, 183 (1915). The Court then examined two other cases to determine whether they could be reconciled with the definition the Court adopted. Each had defined the Ex Post Facto Clause in such a way as to indicate it

extended beyond the three *Calder* and *Beazell* categories.[1] In *Kring v. Missouri*, 107 U.S. 221 (1883), the Court had stated that the *Calder* list was non-exclusive, and it defined an ex post facto law to include, also, one that "in relation to the offence or its consequences, alters the situation of a party to his disadvantage." In *Thompson v. Utah*, 170 U.S. 343, the Court had stated that a law was ex post facto if, after commission of the crime, it deprived a defendant of a "substantial right involved in his liberty."

In *Kring*, the defendant had pleaded guilty to second-degree murder, pursuant to a plea agreement. After reversal of his conviction, because of an unlawful sentence, the state tried and convicted him of first-degree murder. At the time the crime was committed, Missouri law had provided that a plea of guilty to second-degree murder constituted an acquittal of first degree murder. This Court held the state's abrogation of the implied-acquittal rule after the crime was committed, but before Kring entered his plea, violated the Ex Post Facto Clause, because, in denying Kring the benefit of an implied acquittal to which he would previously have been entitled, the change in the law "altered the situation to his disadvantage." 107 U.S. at 235; *see Youngblood*, 497 U.S. at 47-49.

In *Youngblood*, the Court stated it could reconcile *Kring* with the definition of an ex post fact law it adopted if it were to say the change in state law had deprived Kring of a "defense" to which he previously had been entitled. 497 U.S. at 50. The Court explained,

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1. Whether a fourth category of ex post facto laws identified in *Calder* has any legal significance independent of the three traditional categories is before this Court in *Carmell v. Texas*, 98-7450. In *Youngblood*, the Chief Justice pointed out that the Court has not endorsed this fourth category; instead, the Court has adopted a "definition [that] omits the reference by Justice Chase in *Calder v. Bull* to alterations in the 'legal rules of evidence.'" 497 U.S. at 43 n.3.

however, that by "defense" it means something linked to the "legal definition of the offense." *Id.* Thus, for example, "[a] law that abolishes an affirmative defense of justification or excuse contravenes Art. I, § 10, because it expands the scope of a criminal prohibition after the act is done." *Id.* at 49. The Court continued,

> The "defense" available to Kring under earlier Missouri law was not one related to the definition of the crime, but was based on the law regulating the effect of guilty pleas. Missouri had not changed any of the elements of the crime of murder, or the matters which might be pleaded as an excuse or justification for the conduct underlying such a charge. . . . The holding in *Kring* can only be justified if the *Ex Post Facto* Clause is thought to include not merely the *Calder* categories, but any change which "alters the situation of a party of his disadvantage." We think such a reading of the Clause departs from the meaning of the Clause as it was understood at the time of the adoption of the Constitution.

Id. at 50. Accordingly, the Court expressly overruled *Kring*. *Id.*

In *Thompson v. Utah*, 170 U.S. 343, the defendant was initially convicted by a 12-person jury. A new trial was granted, but, in the meantime, Utah's law had changed, and Thompson was tried by an eight-person jury. The Court had reversed the conviction because retrial by a smaller panel had "materially alter[ed] the situation to Thompson's disadvantage." *Id.* at 352-53. The Court in *Youngblood* expressly overruled *Thompson* as well, stating that, while the right to a jury trial "is obviously a 'substantial' one, . . . it is not a right that has anything to do with the definition of crimes, defenses, or

punishments, which is the concern of the *Ex Post Facto* Clause." *Youngblood*, 497 U.S. at 50-52.

As an example of a case in which a defense could not be denied without violating ex post facto principles, the Court in *Youngblood* cited *United States v. Hall*, 26 F.Cas. 84 (D. Pa. 1809). There, a vessel owner was sued by the United States for forfeiture of an embargo bond obliging him to deliver certain cargo. As a legal excuse, the defendant argued a severe storm had disabled his vessel and forced him to land in Puerto Rico, where he was forced by the Puerto Rican government to sell the cargo. *Youngblood*, 497 U.S. at 49. The Court explained,

> [A]ccording to the law in effect at the time Hall forfeited the cargo, an "unavoidable accident" was an affirmative defense to a charge of failing to deliver cargo. . . . [A] subsequent law imposing an additional requirement for the affirmative defense—that the vessel or cargo actually *be lost at sea* as a result of the unavoidable accident—would deprive Hall of a defense of his actions available at the time he sold the cargo and thus be an invalid ex post facto law.
>
> This analysis is consistent with the *Beazell* framework. A law that abolishes an affirmative defense of justification or excuse contravenes Art. I, § 10, because it expands the scope of a criminal prohibition after the act is done. . . .

Id. (emphasis in original).

The Court in *Youngblood* concluded, with regard to the case before it,

> The Texas statute allowing reformation of improper verdicts does not punish as a crime an

> act previously committed, which was innocent when done; nor make more burdensome the punishment for a crime, after its commission; nor deprive one charged with crime of any defense available according to law at the time when the act was committed. Its application to respondent therefore is not prohibited by the *Ex Post Facto* Clause of Art. I, § 10.

497 U.S. at p. 52.

Youngblood is a clear and unambiguous statement of the law as to the scope of the Ex Post Facto Clause. The California Supreme Court properly articulated that law: The Ex Post Facto Clause prohibits only those laws that "alter the definition of crimes or increase the punishment for criminal acts." *People v. Frazer*, 21 Cal. 4th at 22, *quoting Collins v. Youngblood*, 497 U.S. at 43. Hence, there is no ambiguity warranting certiorari.

B. There Is No Split Of Authority On Retroactive Revival Of Time Barred Criminal Actions Warranting Certiorari

Petitioner further asserts there is a "split of authority among national jurisdictions on retroactive revival of time-barred criminal actions," and so certiorari is warranted. (Pet. at 8.) He correctly notes that California appears to be the only jurisdiction that has "squarely held that Legislative revival of time-barred criminal actions" does not offend the federal Ex Post Facto Clause. (Pet. at 9.) He cites several cases that have held to the contrary. (Pet. at 8.) These cases, however, must be viewed in context.

With one exception, the cases cited were decided prior to *Collins v. Youngblood*, at a time when a more

expansive interpretation of the Ex Post Facto Clause was seen as permissible. *Commonwealth v. Rocheleau*, 404 Mass. 129, 533 N.E.2d 1333 (1989)[2]; *People v. Shedd*, 702 P.2d 267 (Colo. 1985)[3]; *Moore v. State*, 43 N.J.L. 203 (E & A 1881); *State v. Sneed*, 25 Tex. Supp. 66 (1860); *Commonwealth v. Guimento*, 341 Pa. Super. 95, 491 A.2d

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2. In *Rocheleau*, the court held that, because the statute of limitations was extended by an amendment after the indictments were time barred under the then-effective statute of limitations, "The indictments [could not] stand." 533 N.E.2d at 1334. According to petitioner, "*Rocheleau* does not specifically state whether its holding was based on the state or federal Constitution." (Pet. at 8 n.1.) In fact, the court's opinion made no mention of any constitutional provision. Rather, it simply cited a number of cases, in each of which the statute of limitations was extended prior to the time the then-applicable limitations period had run, so that any comment regarding reviving an expired cause of action was dictum. *Id.* at 1334, *citing Commonwealth v. Bargeron*, 402 Mass. 589, 524 N.E.2d 829 (1988), *People v. Smith*, 171 Cal. App. 3d 997, 217 Cal. Rptr. 634 (1985), *People v. Whitesell*, 729 P.2d 985 (Colo. 1986), *People v. Massarella*, 80 Ill. App. 3d 552, 400 N.E.2d 436 (1979), *People v. Liebling*, 36 Ill. App. 3d 1073, 344 N.E.2d 520 (1976).

3. Petitioner incorrectly refers to the case as *State v. Shedd*.

In *Shedd*, the court stated that a case "barred from prosecution by a statute of limitations cannot be revived by subsequent legislation that acts to extend the limitations period." 702 P.2d at 268. It then listed five cases as examples. Four of those cases involved an extension of the statute of limitations prior to the expiration of the previously-applicable limitations period. *United States v. Richardson*, 512 F.2d 105 (3d Cir. 1975); *Falter v. United States*, 23 F.2d 420 (2d Cir. 1928); *People v. Liebling*, 344 N.E.2d 520; *Andrews v. State*, 392 So.2d 270 (Fla. App. 1980). The fifth case involved a reduction of a statute of limitations, so the court stated that the rule that a statute of limitations could be extended prior to the expiration of the previously-applicable period was inapplicable. *People v. Montera*, 195 Colo. 118, 575 P.2d 1294, 1295 n.3. (1978). Hence, again, any reference in these cases to reviving expired causes of action was dictum.

166 (1985).[4] In the single post-*Collins* case, the state supreme court held the revival of an expired cause of action violated the state Ex Post Facto Clause, which it interpreted as giving different protection than its federal counterpart. *State v. Cookman*, 324 Ore. 19, 920 P.2d 1086 (1996).

There is, thus, no "split of authority among national jurisdictions" (Pet. at 8) on the question resolved by the California Supreme Court warranting review by this Court. Moreover, to the extent the federal courts have spoken, they support the holding of the state court.

Applying the *Youngblood* formula, the state court found "the only 'defense[s]' that cannot be restricted or withdrawn for ex post facto purposes are those bearing on the 'definition' or 'elements' of the charged crime, or involving 'an excuse or justification for the conduct underlying such a charge.'" *Frazer*, 21 Cal. 4th at 757, *quoting Collins v. Youngblood*, 497 U.S. at 50. A change in the statute of limitation, the court held, "does not impermissibly withdraw a 'defense' as that term of art is used for ex post facto purposes in [*Youngblood*]." *People v. Frazer*, 21 Cal. 4th at 760. Stated otherwise, "[s]tatutes regulating the time at which a future criminal prosecution may be filed do not implicate the manner in which criminal conduct is defined and punished at the time it occurs—the sole concern of the ex post facto clause." *Id.* at 763. Accordingly, a retroactive change in the statute of limitations does not violate ex post facto principles.

In *United States v. Knipp*, 963 F.2d 839 (6th Cir. 1992), the Court of Appeals rejected the defendants' claim that extending the statute of limitations prior to its expiration violated the ex post facto clause.

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4. Petitioner incorrectly cites *Guimento* as having been decided in 1995. In any event, it was decided on state, not federal, grounds.

> Pleading an expired limitations period is certainly a defense in the general sense that it is a defensive measure. More particularly, however, it is a matter in bar of prosecution and as such is distinguishable from a "pure" defense, which defeats one or more of the elements of the crime. This distinction was noted and strongly reinforced by the Court in *Youngblood* when the Court, after an extended analysis, decided to overrule *Kring v. Missouri* [107 U.S. 221], because in *Kring* it had erred in confusing procedural defenses with defenses to the elements of the crime. . . .
>
> Thus, "defense" as used in *Beazell* [*v. Ohio*, 269 U.S. 167] means a defense related to the definition or elements of the crime. It does not have the much broader meaning assigned to it by defendants, because a plea in bar is not related to the definition of a crime and is not pleaded as a nullification of one or more of its elements or as an excuse or justification for its commission.[5/] Accordingly, defendants' reliance on [*Youngblood*] is entirely misplaced.

United States v. Knipp, 963 F.2d at 843-44. The court in *United States v. Brechtel*, 997 F.2d 1108 (5th Cir. 1993), reached the same conclusion. *See also United States v.*

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5. Unlike justification or excuse, the statute of limitations does not put into issue the existence of any of the essential elements constituting the defendant's guilt of the charged offense. Rather, by pleading the statute of limitations, a defendant "simply asserts that by virtue of an extrinsic condition, not relating to the commission of the offense, but recognizing its commission, namely a statute of repose or limitation, he is not now subject to punishment for the crime which he admits having committed." *Osborn v. State*, 194 P.2d 176, 182 (Okla. 1948).

Bischel, 61 F.3d 1429 (9th Cir. 1995) (agreeing with *Knipp* and *Brechtel* that the statute of limitations is not the kind of "defense" to which the Supreme Court was referring in *Youngblood*). The analysis in each these federal cases thus is consistent with the state court's holding.

Petitioner further contends the "'definition of the crime' interpretation of *Youngblood* also creates another conflict among jurisdictions." (Pet. at 10.) This approach, he states, permits a legislature to retroactively eliminate other defenses without violating ex post facto principles, but "[o]ther jurisdictions have found an *ex post facto* violation on this type of issue." (Pet. at 10.)

With two exceptions, the cases he cites were decided prior to *Youngblood*. In one post-*Youngblood* case, the issue before the court was whether a retroactive change in the law violated the state ex post facto clause, and there was no discussion of the federal constitutional provision or *Youngblood*. *Drugger v. Williams*, 593 So.2d 180 (Fla. 1991). In the other, the court noted that prior cases employing the *Kring/Thompson* "substantial protection" analysis were no longer valid in light of *Collins*, it adopted the same test employed by the California Supreme Court here—"legislatures may not retroactively alter the definition of crimes or increase the punishments for criminal acts"—citing *Youngblood*, and it did not find an ex post facto violation. *Ex Parte Scales*, 853 S.W.2d 586 (Tex. Crim. App. 1993). Hence, again, there is no conflict among the jurisdictions warranting certiorari.

C. The State Supreme Court Properly Applied Ex Post Facto Principles, As Articulated In *Collins v. Youngblood*

It is the State's position that reviving an expired cause of action does not violate ex post facto principles. It should be noted, however, that this does not necessarily

mean reviving an expired cause of action is constitutional. It is possible there is another constitutional impediment to these prosecutions. As the state court recognized, in a particular case, the revival of an expired cause of action may offend due process if the defendant is able to make a factual showing sufficient to prove the amended statute affects the accuracy or fairness of a determination of his guilt or that it obviates or avoids procedures that are necessary for preventing miscarriages of justice. *People v. Frazer*, 21 Cal. 4th at 773-75, *discussing United States v. Lovasco*, 431 U.S. 783, 796 (1977).

But while the law must be fair, fairness cannot be had at the expense of a true interpretation of the Constitution. And, if we are true to the meaning of the Ex Post Facto Clause, as explained by this Court and properly applied by the California Supreme Court, petitioner's prosecution does not violate ex post facto principles.

II.

THE CALIFORNIA SUPREME COURT PROPERLY APPLIED DECISIONS OF THIS COURT TO FIND PETITIONER'S PROSECUTION DID NOT VIOLATE DUE PROCESS PRINCIPLES

Petitioner argued below that retroactive application of California Penal Code section 803(g), so as to revive an expired cause of action, is prohibited by the federal Due Process Clause. The California Supreme Court rejected his substantive due process challenge, and it found his procedural due process claim not ripe for adjudication. *People v. Frazer*, 21 Cal. 4th at 765-75. He argues certiorari is necessary to resolve whether reviving an expired cause of action comports with fundamental fairness and to reconcile two lines of Due Process Clause cases. (Pet. at 14-15.) Respondent disagrees.

A. The State Supreme Court Properly Applied Clear And Unambiguous Due Process Principles

Petitioner correctly notes this case "presents the issue" of whether legislative revival of a time-barred criminal action is fundamentally unfair. (Pet. at 14.) Whatever nationwide interest may be attributed to resolution of this issue, however, the California Supreme Court's decision does not conflict with decisions of this Court and requires no resolution by this Court.

The Due Process Clause is the source of three different kinds of constitutional protection. First, "it incorporates specific protections defined in the Bill of Rights . . . . Second, it contains a substantive component, sometimes referred to as 'substantive due process,' which

bars certain arbitrary government actions regardless of the procedures used to implement them. Third, it is a guarantee of fair procedure, sometimes referred to as 'procedural due process,' which applies whenever the state seeks to deprive a person of life, liberty, or property." *Daniels v. Williams*, 474 U.S. 327, 337 (1986).

This Court has "always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended." *Collins v. Harker Heights*, 503 U.S. 115 (1992); *Albright v. Oliver*, 510 U.S. 266, 272 (1994). When a particular constitutional amendment "provides an explicit textual source of constitutional protection" against a particular sort of government behavior, "that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Albright v. Oliver*, 510 U.S. at 813, *quoting Graham v. Connor*, 490 U.S. 386, 395 (1989).

This principle is applicable in the instant case. The Framers of the Constitution considered the matter of retroactive changes in the law, and they drafted the Ex Post Facto Clause of Article I, section 10, of the United States Constitution, to address it. That clause, which declares that "[n]o bill of attainder or ex post facto law shall be passed," provides an "explicit textual source of constitutional protection" against retroactive legislative changes in criminal law, and it is not to be supplemented through the device of "substantive due process." *See People v. Frazer*, 21 Cal. 4th at 772 n.31.

Moreover, this Court consistently has exhibited a reluctance to use the Due Process Clause to interfere with a state's ability to control its criminal procedure. *See Medina v. California*, 505 U.S. 437, 445-46 (1992); *Spencer v. Texas*, 385 U.S. 554 (1967); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). In *Dowling v. United States*, 493 U.S. 342 (1990), the Court declared that "[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due

Process Clause has limited operation." *Id.* at 352. Accordingly, the Court explained, it had defined very narrowly the category of infractions that violate the "fundamental fairness" component of the Due Process Clause. *Id.* Quoting *United States v. Lovasco*, 431 U.S. at 790, the Court stated that an action will be considered fundamentally unfair if it "violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' and which define 'the community sense of fair play and decency.'" *Dowling v. United States*, 493 U.S. at 353 (citations omitted).

In *Medina v. California*, 505 U.S. 437, the Court articulated the proper analytical framework for determining the validity of a state criminal procedure under the Due Process Clause. First, a court looks to "historical practice," which is "probative of whether a procedural rule can be characterized as fundamental." *Id.* at 446, *citing Patterson v. New York*, 432 U.S. 197, 202 (1977). In *Medina*, the Court's historical analysis demonstrated reliance on the common law and on caselaw through the turn of this century. *Id.*; *see also Herrera v. Collins*, 506 U.S. 390 (1993). Contemporary practice, the Court noted, is "of limited relevance to the due process inquiry." *Medina v. California*, 505 U.S. at 447.

At common law, there was no limitation of time for prosecuting a crime. 21 Am.Jur.2d, Criminal Law, § 223, at 408. Then, as now, in the absence of a statutory limitation, a prosecution could be brought at any time following the commission of an offense. *See* 1 Wharton's Criminal Law, § 92, at 628 (15th ed. 1993); Black, *Statutes of Limitation and the Ex Post Facto Clause*, 26 Kentucky L.J. 41 (1937). By Blackstone's time, however, statutes of limitations were common in criminal actions and could be pleaded in bar to a prosecution brought outside the period provided. *See* The American Students' Blackstone at 1007 (Chase's Blackstone 1884).

Sometime prior to 1881, "Mr. Bishop in his treatise on Statutory Crimes, section 266" suggested that "a criminal statute of limitations simply withholds from the courts jurisdiction over the offence after the specified period, and it is competent for the legislature to revive the old jurisdiction or create a new one, when the prosecution may proceed." *Moore v. State*, 43 N.J.L. 203, 213 (E & A 1881). To respondent's knowledge, it was not until 1860 that a court in this country first held a statute of limitations could not operate to revive offenses that were barred at the time of its enactment. *State v. Sneed*, 25 Tex. Supp. at 67; *see* 21 Am.Jur.2d, Criminal Law, § 224, at 411 and n.48, *citing Moore v. State*, 43 N.J.L. 203; *People v. Buckner*, 281 Ill. 340, 117 N.E. 1023 (1917), and *People ex rel. Reibman v. Warden of County Jail*, 242 App. Div. 282, 275 N.Y.S. 59 (1934).

Since that case in 1860, however, few cases have actually *held* that the revival of a prosecution after the expiration of a statute of limitations is prohibited by the constitution. Rather, by far the majority of cases have involved the extension of a statute of limitations, and any discussion about the revival of a prosecution was merely dicta.[6] Thus, it has only been relatively recently that

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6. A number of these decisions explain the distinction between the extension of a statute of limitations and the revival of a right of prosecution after the expiration of a statute of limitations in terms of "vested right," that is, that the running of the statutory period "vests" in the criminal an indefeasible right not to be prosecuted—a sort of de facto grant of immunity. The best example of this view, and the apparent source for it, is the majority opinion in *Moore v. State*, 43 N.J.L. 203, which includes an extensive discussion of "vested rights" with reference to the Due Process Clause. The majority, reasoning by analogy to "civil causes," in which the running of a statute of limitations has the effect of vesting title to property, concluded that "every reason which has pressed courts to ascribe finality to the limitation of civil remedies, when once it has attached, impels this court to predicate the same conclusiveness of the bar against criminal

prosecutions." *Id.* at 212.

In dissent in *Moore*, Judge Van Sykel rebutted the majority's vested rights analysis and the analogy on which it rested. 43 N.J.L. at 229-56. Just as Judge Van Sykel's dissent from the majority's ex post facto holding anticipated the Supreme Court's opinion on the scope of that prohibition in *Collins v. Youngblood*, 497 U.S. 37, the principles he applied to test the majority's "vested rights" theory were consistent with those later set forth by the Supreme Court in *Albright v. Oliver*, 510 U.S. 266, and *Medina v. California*, 505 U.S. 437, to resolve due process claims. 43 N.J.L. at 240-55. For example, he explained,

> No one, I think, will assert that the preservation and continuation [of the right to assert the statute of limitations as a bar to prosecution] is comparable in importance to the state or to its citizens with the right of trial by jury, the privilege of the writ of *habeas corpus*, the exemption from cruel punishments and illegal searches, or the right of freedom from a second trial after acquittal. Yet, each and all of these vested rights, if not entrenched in the organic law, but arising only by statute, it cannot be doubted, might be swept away at the legislative will. They are beyond the reach of hostile legislation, not because they are vested rights, but for the reason that they are rights guaranteed by a law which is higher than the law-maker.
>
> Something more, then, must be done than to conclude that the defendant had by the lapse of the limitation a vested right to immunity, to justify the court in interposing between the law and the prisoner who has violated it; it must be shown that the vested right has a basis in the constitution itself, either by expression or by clear implication. Not only is there an entire absence of any such sanction for it, but the most diligent search which I have been able to give the subject has failed to find even a suggestion, by any text-writer, or in any judicial opinion, that the doctrine of vested rights has any existence in the law; except in its application to property.
>
> It may be that the right of the defendant, prior to the passage of the act of 1879, to set up the statute of limitations, is of such importance that it ought to have been unassailable, but the framers of our constitution

courts have held a state may not revive a right of prosecution after the expiration of a statute of limitations, and those courts have been few in number. *See People v. Frazer*, 21 Cal. 4th at 763-64 and n.5.

Moreover, the courts that have held the revival of a prosecution was unconstitutional did so by finding a violation of the Ex Post Facto Clause, not the Due Process Clause. Likewise, those cases that gratuitously remarked upon the constitutionality of the revival of a right of prosecution after the expiration of a limitations period based their comments upon the Ex Post Facto Clause. *See People v. Frazer*, 21 Cal. 4th at 763-64 and n.5.

There is, thus, no settled, long-standing tradition with respect to the revival of a right of prosecution after the expiration of a statute of limitations. Hence, "historical practice" does not provide a basis for finding that the shelter provided by a statute of limitations is a fundamental right, so that a legislature is prohibited, as a matter of due process of law, from amending it to restore a state's right to prosecute a criminal defendant.

> having failed to put this restriction upon the legislature, the courts cannot do it, without in effect assuming to amend the constitution, to make it conform with judicial ideas of what ought to be.
>
> . . . . . .
>
> Adapting [Justice Chase's argument in *Calder* v. *Bull* [3 U.S. (3 Dall.) 386, that the ex post facto prohibition does not apply to contracts] to the present contention, it may with equal force be asked, why was the ex post facto clause engrafted upon the constitution, if the rights which the criminal may at any time have under existing laws, were deemed to be vested rights entitled to the same protection accorded to vested rights of property?
>
> It is obvious that it was never supposed that such a principle could be invoked to support immunity for crime.

43 N.J.L. at 250-51.

If, however, there is no historical basis for concluding the state procedure violates due process, *Medina v. California*, 505 U.S. 437, requires a court to make a second inquiry. Here, the court inquires "whether the rule transgresses any recognized principle of fundamental fairness in operation." *Id.* at 448, *citing Dowling v. United States*, 493 U.S. at 352.

The most well-known expression of the statement that reviving an expired cause of action is fundamentally unfair is Judge Learned Hand's statement in *Falter v. United States*, 23 F.2d 420 (2d Cir. 1928). It is important, however, to read that statement carefully.

In *Falter*, the defendants argued the extension of a statute of limitations, prior to the expiration of the statute, constituted an ex post facto law. 23 F.2d at 425. Judge Hand rejected their claim, explaining,

> Perhaps they would be right, if the earlier statute had once run in their favor. But the period had not run, and the argument is, and must be, that any change after the commission of the crime, and while the time is running, is within the constitutional prohibition. . . .
>
> In Mallett v. North Carolina, 181 U.S. 589 [] (1901), it was held that the allowance of an appeal to the prosecution was constitutional, and Beazell v. Ohio, 269 U.S. 167 [], laid it down generally that the question was one of degree and depended upon whether the result was "harsh and oppressive." Certainly it is one thing to revive a prosecution already dead, and another to give it a longer lease of life. The question turns upon how much violence is done to our instinctive feelings of justice and fair play. For the state to assure a man that he has become safe from its pursuit, and thereafter to withdraw its assurance, seems to most of us

> unfair and dishonest. But, while the chase is on, it does not shock us to have it extended beyond the time first set, or, if it does, the sta[t]e forgives it.

Falter v. United States, 23 F.2d at 425-26.

First, it is important to recognize the victims in *Falter* were not sexually abused children who, by their very nature, differ from the victims of other crimes. Moreover, it is significant that Judge Hand's comment was made in the context of an ex post facto analysis. It was the Ex Post Facto Clause, and not the Due Process Clause, that was alleged by the *Falter* defendants to have been violated by the amendment to the statute of limitations, 23 F.2d at 425, and it was to that allegation that Judge Hand responded. Indeed, both cases he cited, *Mallett* and *Beazell*, involved claims based on the Ex Post Facto Clause; neither made mention of the Due Process Clause. Additionally, the phrase "harsh and oppressive," which Judge Hand quoted from *Beazell*, did not support his subsequent statement that reviving a prosecution was "unfair and dishonest." In *Beazell*, the Supreme Court had stated that "laws, whatever their form, which purport to make innocent acts criminal after the event, or to aggravate an offense, are harsh and oppressive . . . ." 269 U.S. at 170. It is for that reason that laws in violation of the Ex Post Facto Clause are proscribed by the Constitution. As discussed previously, however, a law reviving an expired prosecution does not fall within that category.

Judge Hand's statement about the unfairness of reviving a prosecution has been accepted by subsequent courts with little or no analysis or question. But it is not a sufficient basis upon which to find the application of Penal Code section 803(g), to revive a prosecution "transgresses any recognized principle of fundamental

fairness in operation." *Medina v. California*, 505 U.S. at 448.

Fairness, as guaranteed by due process, "is a relative, not an absolute concept. It is fairness with reference to particular conditions or particular results." *Snyder v. Massachusetts*, 291 U.S. at 116. Given the unique nature of child molestation cases, retroactive application of California Penal Code section 803(g) does not, *as a matter of law*, violate fundamental fairness. As the state court recognized, in a particular case, retroactive application of the statute may offend due process if the defendant is able to make a factual showing sufficient to prove retroactive application affects the accuracy or fairness of a determination of his guilt or that it obviates or avoids procedures that are necessary for preventing miscarriages of justice. *People v. Frazer*, 21 Cal. 4th at 773-75, *discussing United States v. Lovasco*, 431 U.S. at 796. That question, however, is not presented in this case. *People v. Frazer*, 21 Cal. 4th at 775.

B. There Is No Split Of Authority On Retroactive Revival Of Time Barred Criminal Actions Warranting Certiorari

Petitioner states that, if considerations of fundamental fairness are not dispositive, certiorari is warranted to reconcile two lines of Due Process Clause cases, which "have not been reconciled by this Court[,] and have drawn differing views from lower courts." (Pet. at 15.) Respondent disagrees.

In a civil context, in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945), this Court stated,

> Statutes of limitation find their justification in necessity and convenience rather than in logic. . . . They represent expedients, rather than

> principles. . . . They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay. . . . Their shelter has never been regarded as what now is called a "fundamental" right . . . . [T]he history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

Id. at 314; *see Murphree v. Raybestos-Manhattan, Inc.*, 696 F.2d 459, 462-63 (6th Cir. 1982). In the instant case, the state supreme court found *Chase* to be controlling, finding "no meaningful basis on which to distinguish the six-year period in [California Penal Code] section 800 from the statute of limitations discussed in *Chase*." *People v. Frazer*, 21 Cal. 4th at 769.

Petitioner maintains that, from a federal constitutional perspective, there are two types of statutes of limitations: one type bars a remedy, and is subject to analysis under *Chase* and *Campbell v. Holt*, 115 U.S. 620 (1885); the other type extinguishes the right, and is governed by *William Danzer & Co. v. Gulf & S.I.R. Co.*, 268 U.S. 633 (1925). He asserts the statute of limitations in a criminal case in California is of the latter type, and, under *Danzer*, reviving an expired cause of action is unconstitutional. (Pet. at 15-17, 26-30.)

While *Danzer* and its progeny "analyzed the constitutionality of retroactive time bar statutes by drawing the substance versus procedure distinction, a more recent line of Supreme Court cases commands [the courts] to employ a different analysis." *Shadburne-Vinton v. Dalkon Shield Claimants Trust*, 60 F.3d 1071, 1075 (4th Cir. 1995), *cert. denied*, 516 U.S. 1184 (1996), *discussing Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984), and *General Motors Corp. v. Romein*, 503 U.S. 181

(1992). The recent cases "together stand for the proposition that the Due Process Clause of the Fifth Amendment allows retroactive application of either federal or state statutes as long as the statute serves a legitimate legislative purpose that is furthered by rational means." *Shadburne-Vinton v. Dalkon Shield Claimants Trust*, 60 F.3d at 1076. Accordingly,

> . . . [T]he analysis used by the Court in *Danzer*, *Chase*, and *Campbell* is outdated and no longer valid for purposes of analyzing the constitutionality of retroactive legislation. The relevant inquiry is whether or not the legislation serves a legitimate legislative purpose that is furthered by rational means.

Id.; *Wesley Theological Seminary v. United States Gypsum Co.*, 876 F.2d 119, 122 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990) ("any substance/procedure dichotomy suggested by *Chase* is either completely defunct, or, at the very most, established procedural rules as a safe harbor within which a legislature may freely make retroactive changes").

In rejecting petitioner's substantive due process claim, the California Supreme Court explained,

> Of course, substantive due process principles preclude arbitrary and capricious legislation even where no fundamental right or liberty interest is at stake. Contrary to what defendant claims, section 803(g) is not unconstitutional under this deferential standard insofar as the statute "revives" previously time-barred prosecutions. Indeed, as the legislative history suggests, the statute is based on the assumption that past and future sex crimes against children, even though subject to

> corroboration by independent evidence, would otherwise go unpunished given the difficulty young victims experience remembering and reporting such events, and their emotional vulnerability at the hands of adult perpetrators, including those in positions of trust. The means chosen by the Legislature — allowing prosecution within one year of the official report, inserting express retroactivity and revival provisions, and requiring independent corroboration — seem particularly well suited to addressing the serious concerns underlying section 803(g).

People v. Frazer, 21 Cal. 4th at 773.

The analysis employed by the California Supreme Court was consistent with the standards articulated by this Court and the federal courts of appeal. There is no split of authority that warrants certiorari to review the state court's decision.

CONCLUSION

For the foregoing reasons, respondent respectfully urges this Court to deny the petition for writ of certiorari.

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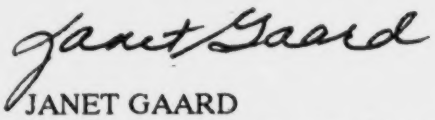

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